
U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

DATE: September 20, 1991

CASE NO. 88-ERA-27

IN THE MATTER OF

BEN L. RIDINGS,
COMPLAINANT,

v.

COMMONWEALTH EDISON,
RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

ORDER OF DISMISSAL

On March 10, 1989, the Administrative Law Judge (ALJ) issued a Recommended Order Dismissing Complaint (R.O.) in this case which arises under the employee protection provision of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1988). Pursuant to the regulations implementing the ERA, the ALJ's decision is now before me for review. see 29 C.F.R. § 24.6 (1990).

Respondent moved to dismiss the case after Complainant failed to appear at the hearing scheduled for September 26, 1988.[1]

On October 12, 1988, the ALJ issued an Order to Show Cause why the complaint should not be dismissed under 29 C.F.R. § 24.5(e)(4).[2] After considering the responses, the ALJ found that Complainant's failure to appear, without first having timely requested and received a continuance, was an attempt by Complainant to manipulate and disrupt the course of the proceeding, constituting contumacious conduct and warranting dismissal of the complaint with prejudice. The ALJ added that Complainant's disruptive conduct was further evidenced by his lack of cooperation in the discovery process.

Both parties have filed pleadings before me. In summary, Complainant, who appears *pro se*, argues that the ALJ's decision is untimely and should not be considered by the Secretary, and alternatively, that he has shown good cause for his absence from the hearing. Respondent maintains that

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[Page 2]

Complainant offers no explanation that would excuse his contumacious conduct and further, that the ALJ's decision was timely.

At pages 2-10 of the R.O., the ALJ thoroughly discussed the procedural background, reciting practically verbatim most of the documentary record before him. After reviewing the record, I find that the ALJ's factual findings are fully supported, and I,therefore, accept them. Consequently, in light of applicable law, I also accept his recommendation to dismiss the claim.

First, Complainant's argument that the ALJ's decision should be set aside under 29 C.F.R. § 24.6(a) because it was not filed within twenty days of his reply to the show cause order is without merit.[3] I agree with Respondent that the regulation appears inapplicable to the situation presented here since Complainant's reply does not fall within the ordinary definition of "evidence." See Peoples v.Brigadier Homes. Inc., Case No. 87-STA-30, Sec. Dec. and Order, June 16, 1988, slip op. at 5; see also 29 C.F.R. §§ 18.2(e), 18.52(a). Even if the regulation does apply, Complainant cannot complain of its violation. Complainant expressly waived the statutory ninety-day time limitation within which the Secretary's final decision must be issued, see 42 U.S.C. § 5851(b)(2)(A), and therefore, Complainant is not adversely affected or aggrieved by any delay in issuance of the ALJ's recommended decision. Cf. 5 U.S.C. §§ 701-706 (1988); Brock v.Pierce County, 476 U.S. 253, 260 n.7 (1986); Roadway Exp.. Inc. v. Dole, 929 F.2d 1060, 1066-67 (5th Cir. 1991) (court declined to deny whistleblower's complaint "merely because" Secretary's decision issued beyond prescribed time period).

Complainant's arguments that the ALJ erred in ruling that his complaint should be dismissed under Section 24.5(e)(4) are similarly without merit. Contrary to Complainant's first argument, the appearance of his attorney at the hearing does not render Section 24.5(e)(4) inapplicable. Not only is it questionable whether the attorney was at that time authorized as Complainant's representative, since he already had been discharged and had given notice of his intent to withdraw, see motion dated September 19, 1988; 29 C.F.R. § 18.34(g)(1), but more importantly, Section 24.5(e)(4) provides that the ALJ may dismiss a claim upon the failure of the complainant or the representative to appear.

Nor has Complainant shown good cause for his failure to appear at the hearing near Chicago, Illinois. Complainant does not deny that he knew the exact time and place set by the ALJ for the hearing and does not contend that he

objected to appearing pro se. The only explanation offered by Complainant, both before me and before the ALJ, is his disagreement with the hearing location.

While the ERA contains no provision concerning the location of the hearing, the regulation at 29 C.F.R. § 24.5(c) provides that "[t]he hearing shall, where possible, be held at a place within 75 miles of the complainant's residence." Complainant argues that the ALJ was without authority to deny his requests, made on September 1, 1988, and by his lawyer at the hearing on September 26, 1988, that the hearing be relocated to Knoxville, Tennessee. In essence, Complainant claims an absolute right to demand a Knoxville location because his "residence" is within 75 miles thereof and because he had never waived his right to that hearing location. It is plain from the record, however, that at the outset of this proceeding, Complainant freely agreed that the hearing should be held in the vicinity of Chicago, Illinois, since that location would be most convenient for his witnesses. As early as June 8, 1988, the ALJ. issued an order specifically noting Complainant's agreement to this effect. Complainant made no response. Subsequently, on June 14, 1988, July 22, 1988, and August 25, 1988, respectively, the ALJ scheduled and rescheduled the hearing location -- first in Chicago and then in Ottawa, Illinois, to accommodate the witnesses, and then back to Chicago again due to the unavailability of lodging. It was not until September 1, 1988, following receipt of the August 25, 1988, notice, that Complainant voiced any disagreement with the hearing site, claiming at that late date an absolute right to the Knoxville location.

I agree with the ALJ's implication that Complainant's residence at the time of hearing, for purposes of Section 24.5(c), was not Knoxville, Tennessee. It is undisputed that at the time, Complainant was living and working in Vidalia, Georgia, which is far more than 75 miles from Knoxville, Tennessee. Consistent with the obvious purpose of the regulation, which is to accommodate Complainant and facilitate the proceeding, I find that Complainant's residence, within the meaning of Section 24.5(c), was Vidalia, Georgia. See 29 C.F.R. § 24.1(b); U.S. v. One Heckler-Koch Rifle, 629 F.2d 1250, 1256-57 (7th Cir. 1980).[4]

In his response to the Order to Show Cause and in his briefs before me, Complainant maintains that an Illinois location was no longer convenient because his witnesses had moved from the state. This allegation, however, is not consistent with Complainant's previous position before the ALJ, and also, has never been substantiated, despite ample opportunity to do so.

In discussing the September 1, 1988, request to relocate the hearing, Complainant's counsel indicated to the ALJ

that Complainant's primary opposition was to the Chicago location. R.O. at 4. He explained that Complainant's witnesses had moved and could be accommodated at friends' homes in Ottawa, Illinois, whereas lodging in Chicago would be expensive. The ALJ accepted this explanation and, on September 8, 1988, issued a further notice relocating the hearing back to Ottawa, Illinois.

Thereafter, the ALJ received no communication concerning this case until September 21, 1988, when he received Complainant's counsel's notice that he had been discharged. Counsel informed the ALJ that Complainant would contact the ALJ directly to seek removal of the case from Illinois. Complainant, however, failed to do so before the hearing, and this failure certainly weighs heavily against him. See 29 C.F.R. § 18.28. Complainant chose instead to place a letter in ordinary mail on the afternoon of Thursday, September 22, 1988, which, of course, did not arrive in the Office of Administrative Law Judges before the hearing date of Monday, September 26, 1988. Instead, it arrived on September 28, 1988, two days after the scheduled hearing.

Significantly, however, in neither this letter nor any of his other filings has Complainant fully identified his witnesses, although ordered to do so on May 27, 1988, or proffered any evidence of their whereabouts. He has not discussed this bare allegation, that his witnesses have moved, with any specificity and has failed to support the claim with an affidavit or any other verifying document. In sum, Complainant has not presented any persuasive evidence or argument that Knoxville, Tennessee, is any more convenient for the hearing than Ottawa, Illinois.

On the other hand, Complainant has submitted documents before me that confirm the ALJ's inference that, in actuality, Complainant was attempting to manipulate the course of the proceeding, "not to make [it] more convenient for himself, but to make it inconvenient and more expensive for the Respondent." R.O. at 15.[5] These documents show that on June 17, 1988, Complainant wrote to his attorney saying "delay this hearing as long as possible.... You can tell this judge you can't make it and that will really back the date off. Evidently his calendar is full to the years end after August." Complainant wrote his attorney again on September 7, 1988, stating:

> I don't want any hassles from this judge about setting this hearing in any town except Knoxville. I feel (as you do) that Edison will make second considerations before taking this matter to Knoxville. Not only will it be expensive to take their Attorneys and witnesses to Knoxville, all in all I really don't feel they have a chance of winning the case.

I find that Complainant demanded a change in the hearing location and then deliberately failed to appear in an effort to protract this proceeding and coerce Respondent. He did so despite his attorney's advice and warning that his failure to appear at the hearing could result in dismissal, see R.O. at 9, 10, 14, and he compounded his disregard by unreasonably delaying contact with the ALJ. Furthermore, Complainant's

failure to appear at the hearing is not an isolated incident of his ignoring the ALJ. Complainant also refused to comply with the ALJ's order to submit a witness list and with Respondent's Request for Production of Documents, despite prodding by the ALJ. R.O. at 4.

As the ALJ recognized, dismissal with prejudice is a severe sanction which must be tempered by a careful exercise of judicial discretion and should not be ordered in the absence of willful or contumacious conduct. Young v. CBI Services. Inc., Case No. 88-ERA-0008, Sec. Dec. and Order of Remand, Aug. 10, 1988, slip op. at 2-3. Dismissal is proper here, however, where, as a dilatory tactic, Complainant deliberately failed to appear at his evidentiary hearing and to comply with Respondent's discovery request and the ALJ's prehearing order. See National Hockey League v. Metro. Hockey-Club. Inc., 427 U.S. 639, 643 (1976); Link v. Wabash R.R. Co., 370 U.S. 626, 633 (1962); Anderson v. United Parcel Service, 915 F.2d 313, 315 (7th Cir. 1990); Powers v. Chicago Transit Authority, 890 F.2d 1355, 1362 (7th Cir. 1989); Roland v. Salem Contract Carriers. Inc., 811 F.2d 1175, 1179 (7th Cir. 1987).[6]

Accordingly, this case is DISMISSED with prejudice.[7]

SO ORDERED.

LYNN MARTIN
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1]The ALJ's references to the hearing date as September 27, 1988, R.O. at 13, 14, are hereby corrected. The ALJ's reference to Friday, September 26, 1988, R.O. at 6, is also corrected to September 23, 1988.

[2]Section 24.5(e)(4) provides:

(4) Dismissal for cause. (i) The administrative law may, at the request of any party, or on his or her own motion, dismiss a claim

(A) Upon the failure of the complainant or his or her representative to attend a hearing without good cause;

(B) Upon the failure of the complainant to comply with a lawful order of the administrative law judge.

(ii) In any case where a dismissal of a claims [sic], defense, or party is sought, the administrative law judge shall issue an order to show cause why the dismissal should not be granted and afford all parties a reasonable time to respond to such order. After the

time for response has expired, the administrative law judge shall take such action as is appropriate to rule on the dismissal, which may include an order dismissing the claim, defense or party.

[3]In pertinent part, Section 24.6(a) provides:

> The administrative law judge shall issue a recommended decision within twenty days after the termination of the proceeding at which evidence was submitted.

[4]Section 24.5(c) contemplates that a hearing site within 75 miles of Complainant's residence will not always be appropriate. Also, since the regulation pertains to convenience, not jurisdiction, and is akin to the concept of venue, I agree with the ALJ that any "right" conferred by the regulation may be waived. Accordingly, and especially under the circumstances presented here, where the alleged discrimination occurred many miles from Complainant's residence, the ALJ did not err in suggesting a hearing location in the vicinity of Chicago, Illinois, on the basis of convenience to Complainant's witnesses. The ALJ's consideration of convenience to Complainant's witnesses was reasonable and tended to promote the expeditious handling of the complaint. See 29 C.F.R. S 24.1(b); see also 29 C.F.R. § 18.27(c).

[5]In responding to the ALJ's decision and Respondent's briefs, Complainant has referred to and attached certain documents, which were not submitted to the ALJ. Respondent has not objected to these filings. I, therefore, grant Complainant's request that I review these documents, as an unopposed motion to supplement the record. See American Min. Congress v. Thomas, 772 F.2d 617, 627 (l0th Cir. 1985); see also Thompson v. U.S. Dept. of Labor, 885 F.2d 551, 555-S6 (9th Cir. 1989); cf. Spencer v. Hatfield Electric Co., Case No. 86-ERA-33, Sec. Final Dec. and Order, Oct. 24, 1988, slip op. at 2-3.

[6]Complainant alleges that his failure to comply with the discovery request and prehearing order we" the fault of his attorney, i.e., that he provided the attorney with all the necessary information and the attorney failed to act. The record does not support this claim. Complainant has shown only that he and his attorney had preliminary and tentative discussions concerning potential witnesses and he has presented no evidence of a response to Respondent's discovery request. Even if the attorney were at fault, which I do not find, Complainant was aware of the failures and must be held responsible for them. See Link, 370 U.S. at 633-34; Anderson, 915 F.2d at 315-16. Additionally, contrary to Complainant's assertion, the fact that Respondent submitted its witness list several days late does not excuse Complainant's complete disregard of the order. See Pyramid Energy, Ltd. v. Heyl & Patterson. Inc., 869 F.2d 1058, 1061 (7th Cir. 1989). It is, after all, Complainant's burden to present and establish his case before Respondent is obliged to present any defense (or witnesses). Complainant does not allege any other circumstances militating against dismissal nor do I find any in light of the clear record of contumacious conduct presented here. See generally Daniels v. Brennan, 887 F.2d 783, 788-89 (7th Cir. 1989); Roland, 811 F.2d at 1178-79. I add that in this case, which arises within the appellate jurisdiction of the United States Court of Appeals for the Seventh Circuit, the ALJ was neither required "to fire a warning shot," Patterson v. Coca-Cola Bottling Co.,

852 F.2d 280, 284 (7th Cir. 1988), nor to impose any lesser sanctions as a prerequisite to dismissal, Daniels, 887 F.2d at 788.

[7]Inasmuch as the case is dismissed pursuant to regulatory Section 24.5(e)(4), I do not consider Complainant's arguments concerning the merits of his complaint.